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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BRUMER COMMERCIAL PROPERTY, et al., Plaintiffs and Appellants, v. YOUNG BIN IM, et al., Defendants and Respondents.	B215456 (Los Angeles County Super. Ct. No. BC372609)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jane Johnson, Judge. Reversed and remanded.

Litchfield Cavo, Edward D. Vaisbort and Melinda W. Ebelhar for Plaintiffs and Appellants.

Mesisca, Riley & Kreitenberg, Dennis P. Riley and Rena E. Kreitenberg for Defendants and Respondents.

INTRODUCTION

This appeal is taken following a bench trial and judgment in favor of the defendants/respondents over a dispute involving an alley running between commercial properties owned by defendants/respondents and plaintiffs/appellants, respectively.[1] Each owned one half of the alley. The Ims erected a fence down the middle of the alley blocking Brumer Commercial's use of the entire alley which it maintained it had used for more than 25 years for itself and its tenants. The issue in the trial court on the merits was whether Brumer Commercial owned a prescriptive easement on the Ims' one half of the property or merely had been using the property as a neighborly accommodation.

Brumer Commercial describes the proceedings in the trial court as "a convoluted procedural morass." Brumer Commercial further explains its opinion of the purported morass as having been caused by the trial court when the court entered what was later found to be an erroneous judgment in favor of the Ims, followed by the granting of Brumer Commercial's motion to vacate the first judgment, and then entering a second judgment in favor of Brumer Commercial, only to be followed later by *sua sponte* actions of the court vacating the second judgment by way of a *nunc pro tunc* order changing its order granting the motion to vacate into a denial, and ordering yet a third judgment in favor of the Ims. Brumer Commercial maintains it is this third judgment which brings it to the appellate court.

For the reasons hereafter given, the judgment is reversed.

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[1] The plaintiffs/appellants are Brumer Commercial Property, L.P.; Philip Solomon; Nathan Solomon; Marcella Solomon and Elaine Solomon. For convenience said plaintiffs and appellants will hereafter be referred to as "Brumer Commercial" unless context otherwise requires.

The defendants/respondents are Young Bin Im and Jung Sook Im. For convenience said parties will hereafter by referred to as "the Ims" unless context otherwise dictates.

FACTUAL AND PROCEDURAL SYNPOSIS

FACTS

History of adjacent property ownership.

Brumer Commercial property.

The commercial real estate owned by Brumer Commercial is located at 2800-2806 James M. Wood Boulevard, Los Angeles California. It was purchased in the year 1980 from noted film star, Gloria Swanson. The named plaintiffs acquired the property by a conveyance, which included the Brumer Family Trust. Ownership was conveyed to the limited partnership entitled Brumer Commercial Property, L.P.

The Ims' property.

The Ims' property is located at 2808-2816 James M. Wood Boulevard which is adjacent to the property of Brumer Commercial. The Ims acquired the property in May of 2005.

The common alley.

An alley runs between the aforementioned adjacent properties, with ownership of each property running to the center of the alley. Brumer Commercial has used the entire alley from 1980 to 2005 as hereafter described.

Use of the alley by Brumer Commercial.

Brumer Commercial maintains that it and/or its tenants made regular and consistent use of the entire alley from 1980 to 2005. Stan Brumer testified as follows: he was manager of the property from 1980 until the time of the Los Angeles riots in 1992 or 1993; the alley was used continuously by himself and his tenants during that time period.

David Brumer testified as follows: he became the property manager after Stan Brumer until 1997; he saw tenants stacking and storing packages in the alley; the entire alley was used; during the rebuilding of the premises of Brumer Commercial following the 1992 riots the general contractor's workers made use of the entire alley while performing their duties.

David Linder testified as follows: he is the current property manager of Brumer Commercial; he has held this position since 1997; he makes regular inspection visits to the property and has observed that the tenants use the entire alley, including that portion now belonging to the Ims; the observed use was for both storage and deliveries.

Carlos Mino testified as follows: he is a current tenant and small business owner located in the property of Brumer Commercial; he has so occupied the property for the past 15 years or approximately since the 1993 riots; he is at the property all day every day except Sundays; he used the property and the alley to open his business and for storage; until access was denied by the Ims, he would store boxes on the South or the Ims' side of the alley; weekly deliveries were taken through the entire alley numbering hundreds of boxes at a time; he observed other tenants take deliveries and send out packages through the alley; when people employed at his shop would take a break they used the entire alley; other tenants would allow their employees or people to use the entire alley also; the aforementioned use was a daily occurrence.

Alley use restrictions imposed by the Ims.

At Westmoreland Avenue a gate extends across the alley which serves the purpose of giving the private property owners down the alley exclusive use of the alley. When Brumer Commercial's building was destroyed in the riots, the gate was rebuilt by Brumer Commercial. The alley was accessed by the private property owners by use of a key to the gate. When the Ims acquired the property from their seller, Mr. Im received a key to the gate across the alley. The record contains no evidence of how the seller of the property came into possession of the key. Following the purchase by the Ims of their property, the Ims changed the locks on the gate. The locks were changed some time in 2005. The obvious effect of this event was to restrict Brumer Commercial's use of the alley for its tenants and the ability to access the alley from the street for deliveries.

In May of 2007, the Ims further restricted full use of the alley by Brumer Commercial by erecting a fence down the center of the alley, making it impossible for the tenants to continue using the entire alley.

Dispute over whether use of the alley was permissive or constituted a prescriptive easement.

The testimony at trial pertaining to this core issue was as follows: Stan Brumer said he had never met or spoken with any of the owners of the Ims' property from 1980 to the time Mr. Im bought the property; he never entered into any agreement with the neighboring landowner concerning the use of the alley; he was never made aware of any agreement between any prior owner of his building and any owner of the neighboring building; and no one ever told him that they were giving him consent to use the alley.

Mr. Im was the only witness for the defense and he primarily addressed the issue of whether he was on notice of any easement at the time of his purchase of the property and his security concerns regarding the alley.

On December 28, 2005, Stanley Brumer sent a letter to Mr. Im which stated in part: "This is to advise you that entrance and egress to the rear area of our building has been permissible for at least twenty-five years to my personal knowledge and perhaps another forty years prior to that time. There has been unabated open, visible and 'notorious' use of that area without restraint, and you do not have a unilateral right to alter that arrangement. [¶] Demand is made upon herein you [sic] to cease and desist from further actions that violate our rights. . . . If the matter is not resolved within five business days of the date hereof, we shall have no choice but to defend ourselves by turning the matter over to our attorneys."

PROCEEDINGS

Brumer Commercial's complaint.

Brumer Commercial filed its verified complaint in the Los Angeles County Superior Court on June 12, 2007, alleging causes of action for quiet title; declaratory relief; and preliminary and permanent injunction. The Ims were named defendants in their capacity as Trustees of the Im Family Trust dated December 15, 2006.

Brumer Commercial filed its verified First Amended Complaint on July 21, 2008, which eliminated its claim for a preliminary injunction, the court having already granted Brumer Commercial's request for a preliminary injunction. Brumer Commercial also added a fourth cause of action for nuisance. The First Amended Complaint is the operative complaint in these proceedings and will be referred to hereafter as FAC unless context dictates otherwise.

In capsule form, Brumer Commercial sought a judgment in which it would be adjudicated as possessing a prescriptive easement over the Ims' portion of the alley and that it was entitled to continue to use the entire alley without interference.

The trial.

The trial occurred on July 18 and 21, 2008, as a bench trial. At the close of Brumer Commercial's case in chief, the Ims moved for a directed verdict which was denied by the court declaring that Brumer Commercial had made a prima facie case for its prescriptive easement claim and further declaring that the real issue for the defense was whether or not the Ims were bona fide purchasers

Statement of decision.

On August 28, 2008, the trial court filed its Statement of Decision which concluded, among other things, that the Ims were bona fide purchasers and therefore any easement which might have existed prior to the time they purchased their property was extinguished. The court further noted that Brumer Commercial had admitted, in its letter to Mr. Im dated December 28, 2005, that the use of the alley was a "permissive" arrangement thus negating an essential element of its claim for prescriptive easement.

Judgment dated August 28, 2008.

Judgment was entered on August 28, 2008, in favor of the Ims. Notice of entry of the judgment was given on September 8, 2008.

Brumer Commercial's motion for new trial and motion to vacate judgment.

On September 12, 2008, Brumer Commercial filed two pleadings with the trial court. The first was its Notice of Intent to Move for New Trial. The second was a

Motion to Vacate the Judgment pursuant to Code of Civil Procedure (CCP) section 663. A third pleading was filed by it on September 22, 2008, entitled Memorandum of Points and Authorities in Support of its Motion for New Trial. The Ims filed opposition to both motions on October 3, 2008. Brumer Commercial filed replies on October 9, 2008 and oral argument was heard on October 17, 2008.

Order granting Brumer Commercial's motion to vacate judgment.

On November 13, 2008, the trial court made its order granting Brumer Commercial's motion to vacate in which the court stated it was unnecessary to make a ruling on the motion for new trial in view of its ruling vacating the judgment. Substantively, the court admitted it had made an error in its decision that the Ims were bona fide purchasers and also declared that the court had interpreted the word "permissible" incorrectly under California law. In its order vacating the August 28 judgment Brumer Commercial was ordered to submit a proposed new judgment and proposed statement of decision.

Brumer Commercial submitted the court requested documents. The Ims filed objections which was followed by a response from Brumer Commercial.

Hearing on proposed statement of decision and proposed judgment; and subsequent judgment dated February 5, 2009.

The court ordered a hearing pertaining to the proposed statement of decision and judgment. At the hearing on February 5, 2009, the court overruled the Ims' objections stating as its reasons those indicated in the court's tentative ruling

The court signed the statement of decision and the judgment in favor of Brumer Commercial. Following entry of the judgment, Brumer Commercial gave notice of entry on February 17, 2009.

Court initiated conference call on February 9, 2009.

The trial court became concerned whether it had made its ruling on the motion to vacate in a timely manner or whether it had lost jurisdiction to make such a ruling. Following up on this concern, the trial court initiated a conference call with counsel on its

own initiative and requested briefing from counsel on whether it had made its ruling on the motion to vacate in a timely manner or whether, similar to the motion for new trial, the court had lost jurisdiction 60 days after the first judgment was rendered.

In response to the court's request for briefing the parties submitted briefs making contentions as hereafter indicated.

Brumer Commercial filed a "Supplemental Brief re: Timeliness of Ruling Pursuant To CCP Section 663" arguing that the court did indeed have jurisdiction to make the November 13, 2008, ruling on the motion to vacate.

The Ims filed their brief on February 18, 2009, which did not address the jurisdictional question, but instead argued that the court had made a substantive error in ruling on the motion to vacate. Brumer Commercial filed an objection and motion to strike the brief of the Ims on February 20, 2009, and requested an opportunity to file a response if the court did not strike the brief

Nunc pro tunc order of the trial court on March 2, 2009, via telephonic hearing.

Instead of striking the brief of the Ims or granting Brumer Commercal the opportunity to respond, the court at a March 2, 2009, telephonic hearing entered a nunc pro tunc order changing its November 13, 2008, order which had granted the motion to vacate into a denial of the motion and vacating the February 5, 2009, judgment. The court further ordered that the original judgment of August 28, 2008, be entered "nunc pro tunc."

In the minute order of the hearing, the court ordered the Ims to submit a new copy of the original judgment which was to be file stamped with the original date of August 28, 2008. The court indicated that because the original August 28, 2008 judgment was cancelled it was ordering that a new judgment be submitted rather than simply reinstating the original first judgment.

Brumer Commercial maintains in its opening brief on appeal that the Ims had apparently filed and attempted to serve the proposed third judgment on Brumer Commercial on March 10, 2009, but the Ims did not serve its counsel at their correct

address on file with the court, but instead used an old proof of service with an old address on it. Brumer Commercial filed objections to the proposed judgment on March 19, 2009.

Brumer Commercial's contentions re uncertainty of subsequent trial court proceedings.

Brumer Commercial maintains it is uncertain about what happened in the trial court at this point and subsequently. Brumer Commercial's concerns are summarized as follows: the Superior Court file does not contain a judgment dated after March 2, 2009; the original judgment which was entered on August 28, 2008 has the March 10, 2009 proof of service attached to it which was originally on the proposed third judgment; it is clear that the judgment in the Superior Court file with the March 10, 2009 proof of service is the original judgment from August 28, 2008 because it is slightly different from the proposed third judgment which the Ims submitted on March 10, 2009; the proposed third judgment served on Brumer Commercial's counsel on March 10, 2009, does not have a conforming stamp, is not signed by the court, has the date typed in rather than handwritten in, and has an amount for costs typed into it at page 2, line 13; the first August 28, 2008 judgment in the court file is conformed, is signed, has the date handwritten into it, and has a blank line at page 2, line 13 for the amount of costs; however, the proof of service on the August 28, 2008 original judgment is now the proof of service from the proposed third judgment served on March 10, 2009, with one addition; on the lower left hand side of the proof of service is a printed date code which appears to represent the date of some processing by the Superior Court; that date code appears to read "4/8/09"; the first two pages of the original August 28, 2008 judgment, however, have the date code "9/9/08" located in a similar spot on those respective pages; it appears that someone took the first judgment from August 28, 2008, added the proof of service from the proposed third judgment served on March 10, 2009, then entered this hybrid document as the third and last judgment on or about April 8, 2009, and placed it as a single document in the Superior Court file.

Brumer Commercial's alleged difficulties arising from uncertain trial court proceedings.

Brumer Commercial maintains that its life on appeal has been complicated by the uncertain events that occurred in the trial court as previously summarized. These alleged complications are summarized as follows: it was never served with any notice that the judgment had been entered sometime in early April 2009; its counsel had to submit on or about May 14, 2009, a declaration detailing the procedural history of the case and explaining why counsel had been unable to answer the simple question in the Civil Case Information Sheet as to the date of the Judgment from which the appeal was taken; counsel had continually monitored the Los Angeles County Superior Court website following receipt of the March 10, 2009 proposed third judgment, and that either later in the week of April 6 or early in the week of April 13, 2009, the trial court's online docket showed for the first time that a judgment in favor of the Ims was entered on August 28, 2009; and accordingly, it immediately filed its notice of appeal and election to proceed by way of Appendix.

DISCUSSION

Standard of review

This court takes note that Brumer Commercial has not addressed the standard of review to be employed in reaching the proper disposition of the case. The Ims have adequately and correctly addressed the standard of review by stating "Generally, on appeal the trial court's conclusions of law are reviewed *de novo* [emphasis in original], and a trier of fact's findings of fact are reviewed under the substantial evidence standard. *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888. The appellate court's power 'begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.' *Charles D. Warner & Sons, Inc. v. Seilon, Inc.* (1974) 37 Cal.App.3d 612, 617. In applying the substantial evidence standard, the appellate court 'must resolve all explicit conflicts in the evidence in favor of the respondent and

presume in favor of the judgment all reasonable inferences.' *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633." In concluding that the judgment should be reversed as hereafter indicated, we apply the aforementioned standard of review.

Timeliness of Brumer Commercial's appeal

Although cryptic in many respects, the gravamen of Brumer Commercial's appeal appears to be centered on the core issue of the propriety of the trial court's rulings in connection with its motion to vacate the judgment of August 28, 2008 and its motion for a new trial and the interpretation of Code of Civil Procedure section 663. Additionally, Brumer Commercial seeks to appeal from the findings of fact in connection with the August 28, 2008 judgment in favor of the Ims.

We look first to the time constraints imposed on a party desiring to appeal from a judgment, in this particular case, the judgment entered on August 28, 2008. Generally speaking, the state has an interest in judgments becoming final and the time constraints imposed for appealing a judgment are indeed confining. Once a judgment has been entered, a litigant has 60 days from notice of entry of judgment or 180 days from the date judgment is entered to appeal the judgment. (See Cal. Rules of Court, rule 8.104.) Once the deadline to file an appeal has passed, the judgment becomes final and non-appealable.

An exception to the jurisdictional deadline embodied in California Rules of Court, rule 8.104 is to be found in California Rules of Court, rule 8.108(c) which provides in pertinent part that a litigant's time within which to file an appeal is extended when a notice of intention to file a motion to vacate judgment is filed until the earliest of: (1) 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order; (2) 90 days after the first notice of intention to move–or motion–is filed; or (3) 180 days after entry of judgment.

This court makes the observation that there appears to be a distinction between the time constraints pertaining to an appeal from a motion to vacate a judgment and from a

motion for new trial. The court further observes that there appears to be no decision directly addressing the issue.

Be that as it may, the face of the statutory provisions are straight forward and clear on the face of the applicable statutes. The motion to vacate a judgment is governed by two statutes. The first is Code of Civil Procedure section 663 setting forth grounds and the second is Code of Civil Procedure section 663a setting forth time limitations.

Code of Civil Procedure section 663 provides: "A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: [¶] 1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected. [¶] 2. A judgment or decree not consistent with or not supported by the special verdict."

Code of Civil Procedure section 663a provides: "The party intending to make the motion mentioned in the last section must file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and specifying the particulars in which the legal basis for the decision is not consistent with or supported by the facts, or in which the judgment or decree is not consistent with the special verdict, either [¶] 1. Before the entry of judgment; or [¶] 2. Within 15 days of the date of mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5, or service upon him by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest. [¶] The provisions of Section 1013 of this code extending the time for exercising a right or doing an act where service is by mail shall not apply to extend the time above specified. [¶] An order of the court granting such motion may be reviewed on appeal in the same manner as a special order made after final judgment."

Brumer Commercial states its argument on appeal as follows: "The court had the jurisdiction to rule on the Motion to Vacate. The Motion to Vacate statutes (C.C.P. §§663 and 663a) do not limit the time in which the court must rule on such a motion, in contrast to the time limitations in statutes which govern motions for new trial trial (C.C.P. §660) or for j.n.ov. (C.C.P. §629).

"The first judgment in this case was entered on August 28, 2008. Notice of Entry was given on September 8, 2008. Appellants filed their Motion to Vacate on September 12, 2008. The Motion is substantively governed by C.C.P. §663. The timeliness of such motions is, in turn, governed by C.C.P. §663a, which allows 15 days after Notice of Entry of the Judgment is given. The Motion was therefore timely brought.

"The trial court's Order granting the Motion was issued on November 13, 2008, sixty-six (66) days after Notice of Entry of the first judgment was given. Because there is no statutory limit to the time in which a trial court must rule on such a motion, the court had jurisdiction to grant the motion.

"There do not appear to be any reported cases addressing this issue. However, Cal. Judges Benchbook Civ. Proc. After Trial Chapter 2, § 2.84 provides: [¶] '[§ 2.84] Judge's Ruling on Motion [¶] Unlike a motion for new trial or for judgment notwithstanding the verdict, there is no requirement that the judge must rule on the motion to vacate within 60 days after service of notice of entry of judgment (see §§ 2.44, 2.63).' [¶] And a leading treatise provides: '(4) [18:498] Hearing and ruling: Unlike the new trial motion (CCP § 661, *see ¶ 18:323 ff.*), there is no requirement that the court set the hearing date and rule within 60 days after the motion is filed.' [¶] Cal. prac. Guide Civ. Trials & Ev. Ch. 18-C.

"The trial court therefore had jurisdiction to decide the Motion to Vacate."

This court is persuaded that Brumer Commercial's argument on the issue contains the proper disposition by virtue of the language contained on the face of the statutes alone. We hold that the trial court had jurisdiction to grant the motion to vacate as contended by Brumer Commerical.

Facts leading up to and including the judgment entered on February 5, 2009.

The record is clear that Brumer Commercial suffered dissatisfaction with the judgment in favor of the Ims dated August 28, 2008. This dissatisfaction was expressed by Brumer Commercial by bringing a timely motion to vacate the August 28, 2008, judgment coupled with a motion to seek a new trial on various grounds, but as pertinent here, on the grounds the court had made an error of law in equating the word "permissible" with the word "prescriptive" in determining that the Ims were bona fide purchasers of the property without notice of any prescriptive easement on the property so purchased.

The record is also clear that the court was convinced of the legal soundness of Brumer Commercial's argument on the merits by its action in vacating the August 28, 2008, judgment and in the place and instead thereof eventually making another statement of decision resulting in the judgment signed by the court on February 5, 2009, which gave Brumer Commercial a prescriptive easement over the disputed property.

The record is also clear that the trial court became apprehensive about its jurisdiction to vacate the August 28, 2008, judgment for fear of running afoul of the time constraints on the court to make a ruling and pondering if the time limitations for making a ruling on a motion for new trial were not also similarly applicable to motions to vacate. As a result, the court on its own motion instigated telephonic argument by counsel and eventually by mesne process vacated the judgment of February 5, 2009, and undertook steps to reinstate the judgment of August 28, 2008, but with an identical judgment except for a different date of August 28, 2009.

To accomplish this metamorphoses with legality the court employed the well recognized technique of making a change utilizing a nunc pro tunc order which reversed its prior ruling in favor of Brumer Commercial's motion to vacate and subsequent judgment and replace it with a denial. This court could not do so for the reasons aptly stated by Brumer Commercial in its opening brief on appeal as follows:

"The trial court entered a judgment on February 5, 2009 which it had the power to enter pursuant to Code of Civil Procedure §663 on Appellants' properly and timely noticed Motion to Vacate. Once that judgment was entered, the lower court's power to amend or change it in any way was severely limited. In *Rochin v. [ ] Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1237, this District Court of Appeal articulated those limitations:

"'The general rule is that once a judgment has been entered, the trial court loses its unrestricted power to change that judgment. The court does retain power to correct clerical errors in a judgment which has been entered. However, it may not amend such a judgment to substantially modify it or materially alter the rights of the parties under its authority to correct clerical error. [Citations.] This general rule is applicable even though time for appeal from the judgment has not yet passed. [Citation.]'"

"Several Courts of Appeal have explained:

"'A court may reconsider its order granting or denying a motion and may even reconsider or alter its judgment so long as judgment has not yet been entered. Once judgment has been entered, however, the court may not reconsider it and loses its *unrestricted* power to change the judgment. *It may correct judicial error only through certain limited procedures such as motions for new trial and motions to vacate the judgment.*' [¶] [(*Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1606, emphasis added. See also *Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1236 (same); *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 181 ('after judgment a trial court cannot correct judicial error except in accordance with statutory proceedings').]

"This Court in *Rochin* discussed the ways that a judgment may be altered. Each of these ways is pursuant to a duly noticed motion authorized by statute. [(*Rochin, supra,* 67 Cal.App.4th 1228, 1237.)] As in *Rochin,* Respondents and the trial court herein relied on none of these prescribed statutory means to vacate the February 5, 2009 judgment. Respondents filed no motion after that judgment was entered.

"Appellants objected, reminding the court at the March 2 hearing that 'there's not a motion before the court to vacate that judgment.' The court, however, was of the opinion that 'if I vacate the motion on my own, it seems to me that I can vacate that judgment.' Appellants' further objections were of no avail.

"The court's *sua sponte* request for briefing on whether its jurisdiction had expired prior to its ruling on the Motion to Vacate may have been appropriate if the court had indeed lost such jurisdiction, which it had not, but the court's decision did not turn on that issue; the court simply felt that it had 'made a mistake' in granting the Motion. The court made its March 2, 2009 ruling based on Respondents' unsoliticted and unnoticed arguments in their supplemental brief that the court had erred in granting the Motion to Vacate in the first instance. Appellants requested the opportunity to respond to those arguments, but the court refused. Those arguments addressed the *correctness* of the court's grant of the Motion to Vacate, not the court's *jurisdiction* to do so, and in the absence of a statutory basis for using them to challenge the February 5, 2009 judgment, they could not and can not justify the March 2, 2009 ruling.

"Having entered a judgment against defendants on February 5, 2009 pursuant to a proper and valid Motion to Vacate, the trial court had no power to order the entry of a third, different judgment against Appellants on March 2, 2009, or to follow that order with an April 2009 purported re-entry of a judgment first entered in August 2008. The order of March 2, 2009 and the judgment entered sometime in April 2009 and backdated to August 28, 2008, are void and of no effect."

Improper use of "nunc pro tunc" procedures by the trial court.

The trial court's use of nunc pro tunc procedures to breathe legal life into the judgment of August 28, 2008, but on a later date of August 28, 2009, was erroneous as a matter of law as contended by Brumer Commercial in its opening brief as follows:

"The trial court's March 2, 2009 Minute Order states that as of that date the court vacated the October 17, 2008 [sic] [fn. reads: In fact the trial court's order granting the Motion to Vacate was issued on November 13, 2008.] Order granting plaintiffs' Motion

to Vacate and (re-)entered the August 28, 2008 judgment 'nunc pro tunc as of the original date of filing.' As noted, and somewhat paradoxically, the court then ordered counsel for defendants to submit a new copy of the August 28 judgment 'which shall be file stamped with original date, August 28, 2008.'

"The cases are legion which hold that a trial court cannot correct its own perceived judicial error [fn. reads: Appellants demonstrate . . . that the trial court's grant of the Motion to Vacate was not, in fact, error.] by means of the *nunc pro tunc* procedure. A *nunc pro tunc* order is one that is issued by a court to correct a clerical error in a previous rendition of an order or judgment, and relates back to the date of the order or judgment being corrected. [(*West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 950-951; *APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 185-186.)] 'It is not proper to amend an order nunc pro tunc to correct judicial inadvertence, omission, oversight or error, or to show what the court might or should have done as distinguished from what it actually did.' [(*Hamilton v. Laine* (1997) 57 Cal.App.4th 885, 891. See also 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, §§65, 67.)] Judicial error is an erroneous decision, as opposed to an inadvertent clerical error. [(7 Witkin, *supra*, Judgment, §68.)]

"Our Supreme Court explains:

"'A court can always correct a *clerical*, as distinguished from a *judicial* error which appears on the face of the a decree by a *nunc pro tunc* order. [Citations.] *It cannot, however, change an order which has become final* even though made in error, if in fact the order made was that intended to be made. . . . The function of a *nunc pro tunc* order is merely to correct the record of the judgment and not to alter the judgment actually rendered-not to make an order now for then, but to enter now for then an order previously made. The question presented to the court on a hearing of a motion for a *nunc pro tunc* order is: What order was in fact made at the time by the trial judge?' [¶] [(*Estate of Eckstrom* (1960) 54 Cal.2d 540, 544, internal quotations marks, italics, and citations omitted, emphasis added.)]

"The order which 'was in fact made' on November 13, 2008 was to grant the Motion to Vacate. That order was correctly recorded at the time; there was no clerical error to correct. Judgment was entered on that order. The trial court had no power to change that order four months later to reflect tha the court did *not* grant that motion, and to vacate the resulting Judgment, even if the court believed upon reflection that it had committed judicial error in doing so. 'If the court misconstrued the evidence before it, or misapplied the law applicable to the facts disclosed by the evidence, or was even misled by counsel, such an error was in no sense a clerical error which could thereafter be corrected by the court upon its own motion . . . .' [(*Lankton v. Superior Court* (1936) 5 Cal.2d 694, 696.)]

"Indeed, the trial court *admitted* that it was utilizing the nunc pro tunc procedure to correct [what] it perceived was error in granting the Motion to Vacate:

"'I think I have to conclude that I erred when I granted the Motion to Vacate; and thus, the original ruling denying Prescriptive Easement, Declaratory Relief, and Request for Permanent Injunction stands. And the Judgment in defendants' favor will be entered nunc pro tunc.'

"'I made a mistake, granting the motion to vacate. So I'm vacating my order granting the Motion to Vacate. I'm vacating the judgment in plaintiffs' favor, and I'm entering the judgment in defendants' favor nunc pro tunc.'

"Nothing could be more plainly stated.

"The trial court had no power to act as it did on March 2, 2009. The order of March 2, 2009, and the third judgment entered thereafter pursuant to it, are void, and should be reversed with directions to the trial court to vacate them."

DISPOSITION

The judgment is reversed and remanded with directions for the trial court to vacate the judgment of August 28, 2008, and August 28, 2009, and to reinstate the judgment dated February 5, 2009, in accordance with the views expressed herein.

Appellants to recover costs of appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.